91-132

No. _____

Supreme Court, U.S.
FILED
JUL 23 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LLOYD LITTLEFIELD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the United States Constitution, ART. VI, clause 2, allows state common law to pre-empt congressionally created federal regulations regarding government retention of safety responsibility on government work sites.

2) Whether the United States government, when acting as an owner of real property, may be liable for its own direct and independent acts of negligence, apart from any legal duty owed under the "peculiar risk" doctrine (non-delegable duty).

LIST OF PARTIES

The parties to the proceedings below and before this Court are:

1. Lloyd Littlefield
2. The United States of America;
3. Frontier Kemper (as a real-party-in-interest)

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PETITION FOR A WRIT OF CERTIORARI

Lloyd Littlefield respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 12, 1991 (rehearing denied May 15, 1991).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 927 F.2d 1099. (Appendix A, *infra.*) That Court's Order denying Petitioner's Petition for Rehearing and rejecting Petitioner's suggestion for rehearing *en banc* was filed on May 15, 1991. (Appendix B) The Order of the United States District Court for the Northern District of California was filed on June 21, 1990 and was entered on June 21, 1990, and is not reported. (Appendix C)

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on March 12, 1991. A timely petition for rehearing and suggestion for rehearing *en banc* was filed on March 26, 1991. On May 15, 1991, the Petition for Rehearing was denied, and the suggestion for rehearing *en banc* was rejected. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction is proper because the underlying action is based on 28 U.S.C. § 1346(b). This petition is timely filed with this Court under 28 U.S.C. § 2101(c).

STATUTES INVOLVED

The relevant statutory provisions are:

A. ART. IV, § 3, clause 2 of the United States Constitution

B. ART. VI, clause 2 of the United States Constitution

C. Rules of Decisions Act, 28 U.S.C. § 1652

D. Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671, et seq. and 2680(a)

E. Nevada Revised Statute § 41.130

F. 29 C.F.R. § 1926.650

G. Work Hours and Safety Act, 40 U.S.C. 333(b)

STATEMENT OF THE CASE

This case presents an issue of significant national importance, which dramatically affects the physical security of all employees performing work for United States contractors. If this Decision is allowed to stand, it will totally conflict with other Ninth Circuit decisions, and other Circuit Court of Appeal decisions.

Congress passed regulations to ensure the safety of such workers by requiring federal safety engineers and inspectors to enforce such standards in the workplace on any jobs being performed with federal funds. This Ninth Circuit decision abrogates these congressional enactments, and holds that federal employees are not required to enforce these standards in the State of Nevada, and by implication, any state whose courts so decide.

On April 18, 1986, a landslide occurred inside a vertical tunnel at Hoover Dam in Nevada. Lloyd Littlefield was working at the base of that slide for a contractor known as Frontier-Kemper. The United States government, Bureau of Reclamation (hereinafter referred to as "the government"), owns the Hoover Dam site and had contracted with Frontier-Kemper to perform repairs inside the tunnel. This work created a huge rock, mud, and concrete ("muck") pile, which eventually slid down a vertical incline onto plaintiff and caused severe injuries to plaintiff, including the loss of his leg.

The United States District Court for the district of Nevada, Honorable Philip M. Pro, found at a bench trial, that the United States government acting as the owner of land, and Frontier-Kemper acting as the contractor, were both *equally* and *independently* negligent. This com-

bined negligence was the proximate cause of Mr. Littlefield's injuries. The court awarded Mr. Littlefield $1,035,150.78 in damages. The Ninth Circuit, Justices Kozinski, Nelson, and Aldisert reversed.

The Ninth Circuit concluded that the Nevada case of *Sierra Pacific Co. v. Rinehart*, 665 P.2d 270 (Nevada 1983) had held that the non-delegable duty or "peculiar risk" doctrine is not a viable theory for recovery in Nevada. The Ninth Circuit held an owner of land cannot be liable for the owner's own negligence provided the owner has hired an independent contractor to perform the work giving rise to the accident. The Ninth Circuit ignored *other* legal duties discussed in *Rinehart* and rejected later applicable Nevada Supreme Court law. Although the United States government clearly owed and breached *other* duties to plaintiff, the Ninth Circuit focused solely on the "non-delegable duty" theory.[1]

Although both longstanding and recent Ninth Circuit and other Circuit Court decisions have held the government is liable for its own, independent acts of negligence, which result in harm to a contractor's employee, the Ninth Circuit rejected (without discussion) long standing Ninth Circuit case law.

Moreover, the Ninth Circuit ignored the District Court's Finding and Conclusion that the U.S. Bureau of Reclamation negligently failed to meet the mandate of federal regulation 29 CFR 1926.650, requiring *the government* to stop work where they know a danger of a landslide exists. Ignoring the trial court's findings on this issue effectively allows Nevada case law to preempt *self-imposed* duties of the United States government as to its own conduct.

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[1] The "non-delegable duty" theory or "peculiar risk" doctrine provides that an owner of real property cannot delegate his duty of reasonable care as to persons on his property to a general contractor he has hired to the extent of taking precautions against dangers arising from "peculiar risks". RESTATEMENT OF TORTS (SECOND) §§ 413, 416. *See*, discussion of doctrines, *infra*, under **Argument A:3.**

This Decision must be reviewed, not only because it conflicts with decisions of the Ninth Circuit and other Circuits, and the Nevada Supreme Court, but because there will be many other such individuals and widows who fall victim to negligent conduct of the United States government. By being in conflict with other panels of the Circuit Court of Appeal, this Decision affects the security of all such employees. It is critical this Court review this Decision to assure uniformity within the Ninth Circuit.

TRIAL COURT'S FINDINGS AND CONCLUSIONS OF LAW

On May 30, 1989, following trial without a jury, the District Court found that on-site government inspectors were aware of a serious on-site slide problem, concerning the pile-up of a huge pile of removed concrete and rock ("muck"). The trial court found the government failed to correct this problem by keeping employees, including government on-site inspectors, from working in front of this pile of muck. The government did not stop work, nor did they warn the contractor's employees of the dangers. (See Decision of District Court, attached as Appendix C)

Because of the government's failure to act, when the muck pile dislodged and slid down the spillway onto Lloyd Littlefield (an employee of contractor Frontier-Kemper) he received severe injuries, resulting in the amputation of his leg. "But for" the government's failure to correct the problem, stop the work or warn of the dangers, Lloyd Littlefield would still have a productive life today.

Besides holding that federal regulations and Nevada statutes gave rise to the government's direct duty to the plaintiff, the District Court also found that the government had a *contractual* duty to the plaintiff. This contract provision provided that the government would *retain control* (i.e., they specifically did *not delegate* that responsibility to the subcontractor) over employee safety

at the site. This contract was heavily quoted and relied on by the District Court in finding the government acted negligently in not preventing employees from working in front of the pile of muck. (See Decision, App. C., Pg. 3)

Based on substantial evidence, the District Court found the government was *fully* aware that not only employees, but *anyone* coming into this particular work area was at serious risk of danger. The government discussed this risk with the employer at a safety meeting, but failed to act. (See Decision, App. C., at pg. 6)

> The potential danger of a slide was recognized by defendant United States of America and Third-Party defendant Frontier-Kemper as early as March 4, 1989, when it was discussed at a Joint Safety Policy Meeting. The danger was thereafter considered by the Bureau of Reclamation Safety Manager Jesse Wert, and Safety Inspectors Harold Whitney and Mark Pata, and was brought to the attention of Frontier-Kemper employees prior to April 18, 1986. Nonetheless, Frontier-Kemper failed to take necessary precautions to prevent the slide of the muckpile and to prevent the potential for injury to muck truck drivers such as plaintiff by keeping muck truck drivers safely away from the area of the muckpile during the operation of the slusher machine. *Similarly, defendant United States of America failed to take steps to ensure against the slide and injury to plaintiff by ordering Frontier-Kemper to cease the muckpile removal system employed and to ensure the safety of muck truck drivers such as plaintiff under what can only be described as inherently dangerous circumstances.*
>
> *Pursuant to the contract* entered between defendant United States of America and Third-Party defendant Frontier-Kemper, *the Bureau of Reclamation reserved the right to inspect the activities of Frontier-Kemper and were authorized under the contract to stop work on removal of the muckpile, but negligently failed to do so.*

(Decision, App. C. at Pg. 9:8-10:6) (emphasis added).

Contrary to the Ninth Circuit opinion, the District Court specifically found that the *independent* and *direct* negligent acts of the United States government *combined* with the negligent acts of the subcontractor, Frontier-Kemper, were the proximate cause of Mr. Littlefield's injuries.

The Ninth Circuit ignored the District Court's clear finding that the government was *independently* liable for its own negligence in failing to comply with 29 CFR 1926.650, Nevada Revised Statute § 41.130, as well as having negligently failed to exercise its related rights and duties for employee safety under the contract.

Instead, the Ninth Circuit reversed the District Court's decision on March 12, 1991. The Court held that since Nevada does not follow the common law theory of "non-delegable duty" (i.e., the United States government as the owner *could* delegate its duty to maintain a safe work place), the government could not be held liable.

This ruling is in error, because it ignores the government's own independent and direct acts of negligence. Under Nevada State statute, Nevada case law, Federal regulations, the contract with the contractor, and other Federal common law throughout the Circuits, the United States government could still be liable for its own, direct negligent acts.

A timely petition for rehearing and suggestion for rehearing en banc was filed on March 26, 1991. The Petition was denied May 15, 1991.

Therefore, to maintain uniformity in the Ninth Circuit opinions and the Federal common law among the different Circuit Courts of Appeal, and to correct the Court's erroneous interpretation of Nevada state law, it is necessary for this Court to grant this writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT ERRED BY HOLDING THAT NEVADA COMMON LAW NULLIFIES THE APPLICATION OF CONGRESSIONALLY MANDATED SAFETY STANDARDS GOVERNING THE CONDUCT OF UNITED STATES GOVERNMENT EMPLOYEES.

Because this action was brought under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and § 2671, the Ninth Circuit was correct to apply "the law of the place where the act or omission occurred" to those theories of liability founded on common law tort doctrine. *Littlefield*, 927 F.2d at 1100.

However, Nevada common law cannot be applied to U.S. government conduct so as to nullify congressional enactments intended to govern U.S. employees' conduct. This would contravene the United States Constitution's supremacy clause, ART. VI, clause 2.

Furthermore, the Court directly contravened the recent Ninth Circuit decision of *Camozzi v. Roland/Miller and the United States of America*, 866 F.2d 287 (9th Cir. 1989).[2] (The clear conflict with *Camozzi* is discussed *infra* at p. 21.)

Lastly, the Court incorrectly interpreted Nevada common law.

Whether under federal common law or state law, the elements of a cause of action for negligence remain the same. These elements are: 1) duty; 2) breach of duty; 3) proximate cause; 4) resulting loss or damage. See, PROSSER AND KEETON ON TORTS, 5th Edition (1984) § 30, Pg. 164.

The issue in this case focuses on the elements of duty and breach of duty: What duty (if any) did the United States government, acting as an owner of real property,

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[2] While *Camozzi* was the District Court's primary authority, and appellant so briefed and argued this to the Ninth Circuit, the Court chose not to cite or comment on the *Camozzi* decision.

owe Lloyd Littlefield, an employee of the contractor Frontier-Kemper?

The District Court here found a "duty" was owed to Mr. Littlefield in several ways, in addition to the "non-delegable" duty theory:

1) The *self-imposed* duty of the United States government pursuant to federal regulations (Decision, App.C at Pgs. 4-5).

2) The duty based on the contract between the United States government and Frontier-Kemper (Decision, App.C at Pg. 12, Lines 6-17);

3) The duty pursuant to Nev. Rev. Stat. § 41.130 and Nevada case law (Decision, App.C at Pg. 12, Lines 1-5);

Each of the above *duties* and *breach of duty* satisfies those elements of a negligence cause of action, even if the additional duty contained in the "peculiar risk" doctrine does not apply in Nevada.

A. Nevada Case Law Cannot Pre-empt Self-Imposed Federal Regulations Which Mandate the U.S. Government Be Responsible for Maintaining a Safe Work Site on Government Projects.

Even if Nevada *common law* prohibits an owner from retaining its obligation to ensure the safety of the contractor's employees on their land, the United States government has its own, self-imposed congressionally enacted duties that cannot be pre-empted by state law.[3] If there is a conflict between application of a federal statute, especially one regulating government conduct, and state law, the federal law must prevail. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). United States Constitution, ART. VI, Clause 2; Rules of Decisions Act, 28 U.S.C. § 1652; *United States v. Little Lake Misere*, 412 U.S. 580, 591, 593 (1973); *Reconstruction Finance v. County of Beaver*,

[3] The issue presented is *not* whether federal *common* law pre-empts state law, cf. *Bowen v. United States*, 570 F.2d 1311) (7th Cir. 1978).

328 U.S. 204 (1946); *Sola Elec. v. Jefferson Elec.*, 317 U.S. 173, 176 (1942).

If Congress intended to reach this issue and if it enacted its intention into law in a constitutional manner, that is the end of the matter, since federal Courts are bound to apply rules enacted by Congress with respect to matters over which it has legislative power (*Steward Organization v. Ricoh Corp.*, 487 U.S. 22, 27 (1988); *See also, Cooper v. Aaron*, 358 U.S. 1 (1958), *Bush v. Orleans Parish School Board*, 364 U.S. 500 (1960).

This is especially true when the issue pertains to U.S. government conduct on U.S. owned property. The United States Constitution, ART. IV, § 3, cl. 2, provides:

> [2.] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

The Ninth Circuit recently expounded on the inability of the State of Nevada to influence the United States use of federal land located in Nevada:

> Pursuant to the Property Clause, "The Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States." U.S. Const. Art. IV, § 3, cl. 2. Under this clause, "'"[t]he power over the public land thus entrusted to Congress is without limitations."'" *California Coastal Comm. v. Granite Rock Co.*, 480 U.S. 572, 580, 107 S.Ct. 1419, 1425, 94 L.Ed.2d 577 (1987) (quoting *Kleppe v. New Mexico*, 426 U.S. 529, 539, 96 S.Ct. 2285, 2291, 49 L.Ed.2d 34 [1976] [quoting *United States v. San Francisco*, 310 U.S. 16, 29, 60 S.Ct. 749, 756, 84 L.Ed. 1050 (1940)]). Thus, it is well-established that "Congress exercises the powers both of a proprietor and of a legislature over the public domain." *Kleppe v. New Mexico*, 426 U.S. 529, 540, 96 S.Ct. 2285, 2292, 49 L.Ed.2d 34 (1976).

> Consistent with these powers, Congress may control the occupancy and use of public lands. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405, 37 S.Ct. 387, 389, 61 L.Ed. 791 (1917), protect the public from hazardous conditions on those lands, *Camfield v. United States*, 167 U.S. 518, 525, 17 S.Ct. 864, 867, 42 L.Ed. 260 (1897), and regulate wildlife on those lands. *Kleppe v. New Mexico*, 426 U.S. at 540-41, 96 S.Ct. at 2292.

State of Nevada v. Watkins, 914 F.2d 1545, 1552 (9th Cir. 1990).

As Justice Scalia recently stated in *Budinich v. Becton Dickinson* (1988) 420 U.S. 972:

> Although state law generally supplies the rules of decision in federal diversity cases, *see* 28 U.S.C. § 1652; *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822 82 L.Ed. 1188 (1938), it does not control the resolution of issues governed by federal statute, *see* U.S. Const., Art. VI, cl. 2 (Supremacy Clause); 28 U.S.C. § 1652; *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 404-405, 87 S.Ct. 1801, 1806, 18 L.Ed. 2d 1270 (1967).

Likewise, Justices Powell and Stevens were joined in dissent by Justices Scalia and White in *Calif. Coastal Comm. v. Granite Rock*, 480 U.S. 572. Justice Powell stated therein:

> One important factor in preemption analysis is the relative weight of the state and federal interests in regulating a particular matter. Cf. *Hines v. Davidowitz*, 312 U.S. 52, 66-69, 85 L.Ed. 581, 61 S.Ct. 399 (1941). The Court recognizes that the mine in this case is located in a national forest, but curiously attaches no significance to that fact. The Property Clause specifically grants Congress "Power to dispose of and make all needful Rules and Regulatlons respecting the Terriory or other Property belonging to the United States." U.S. Const., Art. IV, § 3, cl. 2. *See Utah Power & Light Co. v. United States*, 243 U.S. 389, 404, 61 L.Ed. 791, 37 S.Ct. 387 (1917).

> This provision may not of its own force preempt the authority of a State to regulate activities on federal land, but it clearly empowers Congress to limit the extent to which a State may regulate in this area. In light of this clear constitutional allocation of power, the location of the mine in a national forest should make us less reluctant to find preemption than we are in other contexts.

As this Court stated in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248:

> "[S]tate law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. [*Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm.*, 461 U.S. 190] 203-204 [75 L.Ed. 2d 752, 103 S.Ct. 1713] (1983); *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 [73 L.Ed. 2d 664, 102 S.Ct. 3014] (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 [91 L.Ed. 1447, 67 S.Ct. 1146] (1947). If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 [10 L.Ed. 2d 248, 83 S.Ct. 1210] (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52, 67 [85 L.Ed. 581, 61 S.Ct. 399 (1941)." *Silkwood v. Kerr-McGee Corp., supra*, at 248, 78 L.Ed. 443, 452, 104 S.Ct. 615.

More recently, in *West v. Northwest Airlines, Inc.*, 923 F.2d 657, 659 (9th Cir. 1990), the Court held "when Congress legislates in a field traditionally occupied by the states, such as common law tort and contract remedies in business relationships, there is a presumption against finding preemption of state law." However, the Court went on to explain three ways preemption may occur:

> 'Congress may preempt state law expressly by so stating in explicit terms on the face of the statute' [citation omitted], second, 'when Congress intends that federal law occupy a given field, state law in that field is preempted' [citation omitted], finally, even if Congress has not occupied the field, state law is nevertheless preempted to the extent it actually conflicts with federal law, that is, when both state and federal law is impossible.'

Id. at 659.

The *West* Court determined a state law requiring "good faith and fair dealing", sought to be applied against an airline for overbooking, was not preempted by the federal Aviation Act, only to the extent it did not conflict with the federal law. *Id.* at 661.

Here, preemption by the federal regulations are necessary for two of the given exceptions. First, it is clear Congress intended to occupy the field of worker safety at government work sites when it enacted 29 C.F.R. § 1926.3, § 1926.650 and § 1926.651(k).

Under the contract, the United States government retained certain rights and obligations set forth in 29 C.F.R. § 1926.3, which provides:

> (a) it shall be a condition of each contract which is subject to section 107 of the Contract Work Hours and Safety Standards Act that the Secretary of Labor or any authorized representative shall have a right of entry to any site of contract performance for the following purposes:
>
> (1) To inspect or investigate the matter of compliance with the safety and health standards contained in the Subpart C of this part and following subparts; and
>
> (2) *To carry out the duties of the* Secretary under Section 107(b) of the Act.

In addition, 29 C.F.R. § 1926.650 gives the government the right to inspect, and *stop* the work, if necessary.

Further, 29 C.F.R. § 1926.651(k) provides:

> (k) *Inspections.* (1) Daily inspections of excavations, the adjacent areas, and protective systems shall be made by a competent person for evidence of a situation that could result in possible cave-ins, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions. An inspection shall be conducted by the competent person prior to the state of work and as needed throughout the shift. Inspections shall also be made after every rainstorm *or other hazard increasing occurrence.* These inspections are only required when employee exposure can be reasonably anticipated.

The contract between the government and Frontier-Kemper specifically held this "duty" must be kept in the government's control. The Ninth Circuit characterized this duty as a "right," but not a "duty." *Littlefield*, 927 F.2d at 1104. However, 29 C.F.R. § 1926.3 makes clear these *are duties* to be carried out by the government, based on its reliance on Section 107(c) of the Contract, Work Hours & Safety Standards Act. Under § 107(b) of the Contract, Work Hours & Safety Standards Act, 40 U.S.C. § 333(b):

> The Secretary is authorized to make such inspections, hold such hearings, *issue such orders, and make such decisions based on findings of fact, as are deemed necessary to gain compliance with this section* and any health and safety standard promulgated by the Secretary under subsection (a) of this section, and for such purposes the Secretary and the United States District Courts shall have the authority and jurisdiction provided by sections 38 and 39 of Title 41. In the event that the Secretary of Labor determines noncompliance under the provisions of this section after an opportunity for an adjudicatory hearing by the Secretary of any condition of a contract of a type described in clause (1) or (2) of section 329(a) of this title, the governmental agency for which the contract work is done *shall have the right to cancel the contract*, and to enter into other con-

> tracts for the completition of the contract work, charging any additional costs to the original contractor. In the event of noncompliance, as determined by the Secretary after an opportunity for an adjudicatory hearing by the Secretary, of any condition of a contract of a type described in clause (3) of section 329 (a) of this title, the governmental agency by which financial guarantee, assistance, or insurance for the contract work is provided shall have the right to withhold any such assistance attributable to the performance of the contract. Section 330 of this title shall not apply to the enforcement of this section.

The "second exception" for preemption is evident because the Ninth Circuit interpretation of Nevada common law, holding the U.S. government *can* delegate its duty to maintain safe work conditions, clearly conflicts with federal statutory law. State and federal law cannot "coexist" in this instance, and the conflict must be resolved in favor of the federal statutory enactment. In so doing, no alteration of Nevada law will occur. This court's decision will have application only to federal employees' duties on federal projects and the employees' safety on those projects.

B. The Government Had a Contractual Duty to Maintain a Safe Work Site.

The District Court quoted the contract between the government and the contractor in detail:

> "a. The Contractor shall not require any laborer or mechanic *employed in the performance of the contract to work under conditions which are unsanitary, hazardous, or dangerous* to his health and safety, as determined under construction safety and health standards promulgated by the Secretary of Labor under Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 317, et seq.), as amended, and 'Constitution Safety Standards,' published by the Bureau (Bureau of Reclamation).
>
> b. The *Contractor shall fully comply with the Bureau's 'Construction Safety Standards' and amend-*

> *ments of revisions* thereto in effect on the date bids are received. This handbook will be provided at no charge for use in connection with the specifications. Construction Safety and Health Standards promulgated by the Secretary of Labor may be obtained from any regional office of the Occupational Safety and Health Administration of the U.S. Department of Labor.
>
> c. The Contractor shall submit in writing a proposed safety program in the form and time intervals prescribed in Section 2 of the 'Construction Safety Standards.'
>
> d. The Contractor is responsible for being cognizant of and insuring compliance with the above requirements set forth in subparagraphs a. and b. above. Such responsibility shall apply to both his operations and those of his subcontractors. When violations of the safety and health standards referenced in subparagraph a. are called to his attention by the Contracting Officer or his authorized representatives, the Contractor shall immediately correct the condition to which attention has been directed. Such notice, either oral or written, when served on the Contractor or his representatives shall be deemed sufficient.

Decision, Pg. 3 (emphasis added)

Further, under the contract, the United States was required to meet the requirements of 29 C.F.R. 1926.650. *See*, Decision, App. C at Pg. 4.

When looking at the element of duty in a negligence action, that duty can also be established by way of contract. PROSSER & KEATON ON TORTS, 5th Edition § 92, Pg. 663. Similarly, duty can be avoided through contract, by the parties agreeing in advance that a party is under no obligation and shall not be liable for the consequences of conduct that would otherwise be negligent. *Id.* at § 68, Pg. 428. *See also, Camozzi v. Roland Miller*, 866 F.2d 287 (9th Cir. 1989), which holds the government liable for failing to enforce contract provisions for retained safety responsibilities.

Here, the contract specifically stated the government could *not* delegate its duty to maintain safety (outside of any common law "non-delegable" duty). This duty is contained in the contract by its citation to federal regulations which hold the government retains safety responsibility. (See Decision, App. C at Pgs. 4-5) Nevada respects the right to make contracts, and nowhere in Nevada law does it state a duty in a tort action for negligence cannot be established by a contractual duty.

Therefore, the Ninth Circuit's sole focus on the *common-law* doctrine of "non-delegable" duty was in error because there was a *contractual* duty not to delegate safety responsibility.

C. Nevada Law Recognizes That a Negligent Defendant Is Responsible For All Foreseeable Consequences Proximately Caused By Its Negligence.

Under the "non-delegable duty" theory, an employee of a contractor can sue the owner of the property where a "peculiar risk" of unreasonable harm exists and the owner fails to take adequate safety precautions. The RESTATEMENT (SECOND) OF TORTS provides:

> § 413. Duty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to Contractor.
>
> One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer
>
> > (a) fails to provide in the contract that the contractor shall take such precautions, or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.
>
> § 416. Work Dangerous in Absence of Special Precautions.

> One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contractor otherwise.

This doctrine is also known as the "peculiar risk" doctrine, and allows holding an owner liable for the acts of its contractor, even where the owner is not directly or independently negligent. This doctrine provides that given the existence of such dangers, the owner cannot delegate the responsibility of caution to the contractor. *Thorne v. United States*, 479 F.2d 804, 808 (9th Cir. 1973); *see also* 31 ALR 2d 1375.

Virtually every state in the nation, except the State of Nevada, has adopted the Restatement language. In the case of *Sierra Pacific Power Co. v. Rinehart* (1983) 665 P.2d 270, the Supreme Court of Nevada stated that the "non-delegable" duty theory, or "peculiar risk doctrine" cited in the Restatement does *not* apply in Nevada.

However, the *Rinehart* case, as well as later Nevada authority (which severely limited the *Rinehart* holding), is clear that *other* duties may be owed and breached in a negligence action involving a general contractor, which will establish liability.

Nevada Revised Statute § 41.130 provides:

> Whenever any person shall suffer personal injury by wrongful act, neglect or default of another, the person causing the injury shall be liable to the person injured for damages; and where the person causing such injury is employed by another person or corporation responsible for his conduct, such person or corporation so responsible shall be liable to the person injured for damages.

The District Court found the United States government (independently from Frontier-Kemper) *directly* liable for

negligently failing to take necessary safety precautions, even though it was aware of the danger of a slide. The District Court relied on Nevada Revised Statute § 41.130, as well as the cases of *Taylor v. Silva*, 96 Nev. 738, 615 P.2d 970 (1980) and *Nevada Transfer v. Warehouse Co.*, 60 Nev. 87, 99 P.2d 633 (1940) to support its conclusion of law regarding duty.

The Ninth Circuit relied instead on the *Rinehart* case. However, even the *Rinehart* case focused on three *separate* duties that could be breached—only one of which was the "non-delegable duty" theory.

In *Rinehart*, the wife of a contractor's employee brought a wrongful death suit against the landowner-contractor for the employee's fatal injuries sustained in a fifty foot fall during the construction of a cooling tower. While the Nevada Supreme Court concluded the decedent was owed no duty under any of *three* separate theories of duty (665 P.28d at 271), each duty was separately discussed and applied to the facts of that case. Here, the Ninth Circuit focused only on the "non-delegable" duty theory, and held that duty inapplicable as a matter of law. It failed to discuss the other duties in *Rinehart*, which have application here.[4]

One such duty is that an employee of a contractor is an invitee of the owner of the land, to whom an owner owes a duty to exercise reasonable care. *Rinehart*, 665 P.2d at 272. The owner is also under a duty to warn an invitee of hidden dangers, but that duty does not extend to *obvious* dangers. *Id.* at 272. In *Rinehart*, these other duties were not found to have been breached because the danger was an obvious one. Since the height of the cooling tower "was obvious to all", the owner was not under a duty to warn of the danger. *Id.*

Here, the government as landowner and general contractor owed a duty to exercise reasonable care, by cor-

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[4] In *one* sentence, the Ninth Circuit dismissed the District Court's findings of fact on these other duties, without discussion. *Littlefield*, 927 F.2d at 1104-1105.

recting the known danger of the possible rockslide. It had a further duty to post warning signs, or warn employees or others coming into the slide area of this *hidden* danger. It was not obvious or apparent to Mr. Littlefield, who was standing at the site, that a rockslide was imminent, or even possible.

The *Rinehart* court also found that the danger present there was a "necessary consequence" of building a cooling tower, and found the landowner therefore had no *common law* duty to take safety precautions during the construction. *Id.* at 273. In contrast, the danger of the rockslide build-up was not a "necessary consequence" of the project. The trial court found other removal systems were available and that Mr. Littlefield did not have to be placed in front of the muck pile.

In addition to any *common law* duty to take reasonable safety precautions, the government had a *contractual duty*, as well as *self-imposed* (federal regulatory) duties to maintain safety at the work site. The government's clear knowledge of the danger, and failure to correct, or warn, would impose liability even under the *Rinehart* criteria.

The Ninth Circuit also ignored the later Nevada Supreme Court case of *Karadanis v. Newcomb*, 698 P.2d 872 (Nevada 1985). That case applied the *other* duties articulated in *Rinehart* (apart from the "non-delegable duty" theory) to find a landowner liable.

In *Karadanis*, an employee of a contractor working as a sheetrock taper on a construction project had been taping sheetrock on the second floor of a building. While attempting to get some supplies off of a forklift, he proceeded through an unfamiliar area in the construction site to help some other sheetrock hangers. He was crushed by a descending personnel elevator (manlift).

The court rejected the owner's contention that it owed no legal duty because the unsafe condition was "open and obvious." *Karadandis*, 698 P.2d at 874. Since the victim was in an unfamiliar area of the site, the danger was not

"open and obvious" to him. *Id.* The court also rejected the contention that this was an "inherent dangerous condition at a construction site." *Id.*

In *Karadandis*, the dangerous condition "was not a necessary consequence of the construction, but rather, arose out of the modification of the manlift by removing a portion of the mandatory safety" protections. *Id.* at 875. *See also, Jeffers v. Bob Kaufman Machinery*, 707 P.2d 1153 (Nevada 1985) (machine owner's failure to warn an employee operating the machine of a non-obvious danger can be held liable in a negligence action).

Similarly, Lloyd Littlefield was in unfamiliar territory the day of his accident. Indeed, on the job for only one week, he was filling in that day for an absent muck truck driver. It was his first morning at the slide area, and he had no idea there was a slide danger. (See District Court, App. C at Pg. 7). Further, the dangerous condition here was also not "inherent", but *man-made*, and in violation of federal safety regulations. The District Court made this *factual* finding.

Had the Ninth Circuit applied these other *duties* to the *Littlefield* situation, as the District Court did, they could only have found the government was liable for its own direct and independent negligent acts. Instead, they only focused on the "non-delegable duty" theory.

II. THIS NINTH CIRCUIT PANEL'S DECISION CONFLICTS WITH OTHER NINTH CIRCUIT PANELS, AS WELL AS OTHER CIRCUIT COURTS OF APPEAL.

Prior to this decision in *Littlefield v. United States*, the Ninth Circuit consistently held that where the government was directly negligent in failing to supervise compliance with safety standards at a work site, it would be held liable for its conduct, outside any state tort theory to the contrary. These cases will be explored to show that the *Lttlefield* case is an anomaly, inside the Ninth Circuit, as well as among several other Circuit Courts of Appeal throughout the United States.

A. This Decision Conflicts With Previous Longstanding Ninth Circuit Law.

Although the District Court specifically relied on the case of *Camozzi v. Roland/Miller*, 866 F.2d 287 (9th Cir. 1989), the Ninth Circuit *ignored Camozzi*, and failed to explain why *Camozzi* should not apply. This failure to distinguish or explain *Camozzi* leaves an obvious conflict in Ninth Circuit law.

In *Camozzi*, two employees of a sub-contractor who were injured at a construction site for a new postal facility brought an action against the United States government under the Federal Tort Claims Act, 28 U.S.C. § 1346(b). The District Court entered judgment in favor of the government; the Ninth Circuit reversed the decision.

The main issue before the Ninth Circuit was whether the government's conduct upon which the plaintiffs relied for recovery fell within the "discretionary function" exception.[5] The plaintiffs did not challenge the United States Post Office's execution of the contract imposing responsibility for worker's safety upon the contractor. Instead, they contended that under the contract, the United States Postal Service *retained a responsibility for overseeing compliance with safety precautions*, and contracted with Roland/Miller to discharge that responsibility. *Camozzi*, 866 F.2d at 288. The plaintiffs alleged their injuries were caused by the government's negligent performance, *directly* and *through* its agent or employee based on its retained safety obligations. *Id.*

A close reading of the contract provisions in the *Camozzi* case, demonstrates the same standard contract

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[5] The discretionary function exception is discussed in 28 U.S.C. 2680(a) and provides that "the [Federal Tort Claims Act] shall not apply to any claims based upon an act or omission of an employee of the government, exercising due care . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the government, whether or not the discretion involved the abused."

provisions existed there as exist in this case. These provisions include that the government can change "the method or manner of performance of the work" without notice, and has the ability to "terminate or suspend the contract at its convenience." *Id.*

The Ninth Circuit made clear that the *Camozzi* plaintiffs sued the government under *two separate* and *distinct* legal theories. The first was under the "peculiar risk doctrine," which involves an employer's non-delegable duty. 866 F.2d 288 n.3. The second theory was that the government directly or through its agent negligently failed to supervise compliance with safety standards at the work site. *Id.* Therefore, regardless of whether the "peculiar work doctrine" applies to *Littlefield*, there is no law in Nevada that protects the United States from liability in *Littlefield* under the *second theory*. Indeed, Nev. Rev. Stat. § 41.130 holds a party liable for any direct negligent acts.

The *Camozzi* Court also addressed whether the legal theory sought by the plaintiff could be abrogated under the "discretionary function" doctrine. They held it could not.

> The discretionary function exception "protects only governmental actions and decisions based on consideration of public policy." [Citation omitted.] It insulates the government from liability if the action challenged . . . involves the permissible exercise of policy judgment. [Citation omitted.] . . . The negligent failure of the United States Postal Service to discover the floor opening through which the plaintiffs fell was not of this nature.

Id. at 289.

In the *Camozzi* case, the negligent acts of the government were one step removed from the *even more* direct and affirmative conduct here. There, the plaintiffs alleged there was a negligent failure of the Postal Service *to discover* the floor opening through which plaintiffs fell, because their inspector did not properly inspect. Here,

the negligent acts were blatant and direct. Here, the U.S. government was found by the Court to have *actual* knowledge of the dangers existing at the site, and had actual knowledge that other methods of removal of the muck was possible, and for several weeks prior to the accident the United States inspectors did nothing to eliminate the danger or warn employees or others who might be in the area that a slide danger existed. The acts of the U.S. government in *Littlefield* could be described as reckless disregard or "gross negligence".

The *Camozzi* case relied heavily on *McGarry v. United States*, 549 F.2d 587 (9th Cir. 1976).[6] That case involved a Nevada lawsuit for wrongful death of an employee of an independent contractor working with the Atomic Energy Commission, which occurred in the State of Nevada. Again, there was a contract provision similar to that in *Littlefield*, which provided:

> Contractor shall take all reasonable precautions in the performance of the work under this contract to protect the health and safety of employees and of members of the public and to minimize dangers from all hazards to life and property, and shall comply with all health, safety, and fire protection regulations and requirements . . . In the event that the contractor fails to comply with said regulations or requirements, the [government or its agencies] may, without prejudice to any legal or contractual rights issue an order stopping all or any part of the work . . . The [government] shall have the right to inspect the work and activities of the contractor under this contract at such time and in such manner as is deemed appropriate.

This contract was also similar to the retained safety inspection function in the *Littlefield* contract.

A crucial distinction between the facts of *McGarry*, and the facts of *Littlefield*, was that in *McGarry*, the

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[6] Likewise, the District Court in *Littlefield* also relied on *McGarry*. *See* District Court Opinion, App. C at Pg. 12.

government failed to actually perform its safety inspections, and therefore was not aware of the dangerous conditions on the land. The government asserted there, that under the Federal Tort Claims Act, the United States waived its immunity only in cases where the injury "results from negligence of a government employee." *McGarry*, 549 F.2d 590. In other words, the government argued that the Court need not even explore the doctrine of peculiar risk/non-delegable duty, if the government was *directly* and *independently* negligent.

Because that was not the case in *McGarry*, the Ninth Circuit did apply the peculiar risk/non-delegable duty theory and held the government liable. This Ninth Circuit panel distinguishes *McGarry*, because it was decided before the 1983 case of *Sierra Pacific Power Company v. Rinehart*, *supra*. However, even if that doctrine does not apply in the State of Nevada today, the Ninth Circuit previously questioned "whether the government can administratively immunize itself from liability under applicable state law as a matter of policy." *McGarry*, 549 F.2d at 591.

While the *McGarry* Court felt it did not need to address that question then, that question should be addressed now, as a matter of public policy, because the failure to do so will result in an inconsistent result throughout the country concerning worker safety at government work sites.

The *McGarry* case found liability under the non-delegable duty theory as well as contractual duty; other Ninth Circuit and Circuit Court of Appeal cases make clear that if *other* legal theories are pursued which include the government's *own* direct and independent acts of negligence, the government can be held liable.

One recent Ninth Circuit case, decided only months before the *Littlefield* decision, also made clear that the government can be liable for its own independent and negligent actions. In *McCall v. United States*, 914 F.2d 191 (9th Cir. 1990), employees of an independent con-

tractor who were injured in a government construction project brought an action under the Federal Tort Claims Act. The Ninth Circuit reversed a District Court judgment in favor of the government.

The Court found liability under *two* separate legal theories: 1) Under Montana law, the project owner had a non-delegable duty to retain a safe workplace for employees of independent contractors engaged in inherently dangerous activities (i.e., the peculiar risk doctrine); *and* 2) that while the government cannot be held *vicariously* liable for negligence of independent contractors, it may be liable where its own employees have breached the duty through their own negligent conduct. *McCall*, 914 F.2d at 195.

> The United States, therefore bears liability for the negligence of its own employees in insuring the taking of safety precautions, rather than vicarious liability for the negligence of its independent contractor.

Id. at 195.

Further, relying on *Camozzi*, and holding that the discretionary function exception does not apply where the government fails to comply with its safety procedures requiring inspection of independent contractor's compliance with safety regulations, the Court held that under the Federal Tort Claims Act "the government may not be held vicariously liable for the negligence of independent contractors but may be liable where its own employees have breached the duty through their own negligent conduct." *Id.* at 196.

The United States government in *Littlefield* clearly was directly and independently liable for the negligence that existed on the site. The District Court found the government was aware of the dangers of the muck pileup, discussed the dangers at a meeting with the contractor, and was aware that there were other safer removal systems. However, the government failed to correct the dangers on the land, and failed to warn employees and others of the danger of the imminent rock slide. There-

fore, even in the Ninth Circuit, the government should have been liable for its own direct and independent acts of negligence, outside of the peculiar risk/non-delegable duty doctrine.

The *Camozzi* line of cases do not rely on state law. They rest on the federally imposed federal obligations that this Ninth Circuit in *Littlefield* ignores. By failing to discuss or distinguish *Camozzi*, the opinion leaves a glaring void. Given that the District Court relied on *Camozzi*, and the Ninth Circuit failed to discuss it, future legal researchers will be puzzled how to resolve this obvious conflict.

B. This Decision Conflicts With Other Circuit Court Holdings on the Same Issue.

Several other Circuit Courts of Appeal throughout this country have dealt with this same issue. In all of those cases, the other Circuit Courts have also held that the government may be liable for failing to exercise its retained safety responsibilities, and that this is not a "discretionary function." The Circuit Courts have found this even where the "peculiar risk doctrine" is not even raised as a viable theory.

In *Aslakson v. United States*, 790 F.2d 688 (8th Cir. 1986), the father of an operator of a sailboat who was killed when a sailboat mast struck electrical power lines owned and operated by a governmental agency known as the Western Area Power Administration (WAPA), filed a claim against the United States government. The decedent was not an employee of an independent contractor in that case, but merely a person boating on a lake who was killed when the aluminum mast of his sailboat made contact with exposed electrical power lines owned and operated by the government. The plaintiff claimed the government was negligent by failing to provide adequate vertical clearance between the power lines and the surface of the water.

This governmental agency was to inspect and maintain these power lines on a routine basis. The agency was

aware of the dangers of the lines over the lake, and although several long term solutions had been suggested by their review team (such as removing the lines and installing submarine cable), the agency decided to elevate the existing lines over the main part of the lake. *Id.* at 690. The agency took no action, however, either to increase the vertical clearance or to warn boaters of the power lines over the lake. Such failure resulted in the death of plaintiff's son.

In *Aslakson*, the Court found that

> Furthermore, WAPA's policy does not allow its officials to choose a course of action they deem desirable when their power lines are dangerously low. The policy's mandate is clear; WAPA must raise its power lines if they constitute a safety hazard . . . Once the government has exercised its discretion to adopt safety rules and to conduct safety inspections, it is obligated . . . to take reasonable steps to enforce compliance with the applicable safety regulations.

Id. at 693.

Therefore, the U.S. government was found liable for its own direct acts of negligence in failing to correct the deficiencies it was aware of. *Aslakson* had nothing to do with the non-delegable duty theory, and demonstrates that where the government fails to exercise its retained safety responsibilities, it can be found liable for the negligence resulting therefrom.

The Eighth Circuit also discussed this doctrine in *McMichael v. United States*, 751 F.2d 303 (8th Cir. 1985).

McMichael was the second appeal of consolidated damages actions against the United States, seeking damages for death and injuries caused by an explosion at a munitions plant. The Court had earlier decided that the Defense Department's failure to enforce the contractor's compliance with safety regulations was not the kind of decision protected by the discretionary function exception. The Defense Department in *McMichael* was pur-

suing a proprietary rather than a regulatory objective in its contract to manufacture photoflash cartridges. The Defense Department kept three quality assurance inspectors on the site at the plant. These inspectors had the responsibility to insure safety at the plant, including compliance of the safety manual. Thus the Court concluded that "the Defense Department inspectors were not called upon to make discretionary regulatory judgments. Rather, they had a number of precise inspections to perform which involved no judgment concerning agency policy. Hence the Court held the discretionary function exception does not apply to a claim that governmental employees fail to comply with regulations or policies designed to guide their actions in a particular situation. *Id.* at 305.

The Third Circuit Court of Appeals held similarly in *Merklin v. United States*, 788 F.2d 172 (3d Cir. 1986). There, a former foreman in a radioactive ore processing plant brought an action against the United States government under the Federal Tort Claims Act, seeking compensation for injuries he sustained while working with radioactive materials. The District Court granted summary judgment in favor of the United States government; the Circuit Court of Appeal reversed.

The plaintiff in that case filed suit under *three* separate legal theories. The first, was that the Atomic Energy Commission had breached its duty to inspect properly the Grace facility (where he worked). *Merklin*, 788 F.2d at 173. He also suggested that AEC, the employer of Grace, owed a duty to Grace's employees to insure that the processing plant was not an unreasonably dangerous work environment (i.e., the peculiar risk doctrine). *Id.* at 173. Finally, the plaintiff contended that the AEC, as the owner of a dangerous chattel (the monazite and/or its derivatives), owed a duty to warn those who had come in contact with the chattel of the risks associated with it. *Id.*

Again, this case demonstrates that there are *separate* legal theories that may be pursued when the government is accused of negligent conduct. Here, *Merklin*'s second legal theory, the peculiar risk doctrine, may not apply in the State of Nevada, but there is nothing in Nevada law that would prevent the first and third legal theories in *Merklin* to be applied here. As in *Merklin*, the United States government in *Littlefield* was also negligent in warning those who would come in contact with the rockslide, of the risks associated with it. Further, as in *Merklin*, the United States government breached its duty to inspect properly the work site area, and went even further, in failing to correct known dangerous deficiencies.

The *Merklin* court held that "if the tort involves a breach of an 'indirect' duty imposed on the employer, rather than an 'indirect' duty based on vicarious liability doctrines, the United States government can be held accountable." *Id.* at 175. Other Circuits have followed this line of reasoning. *Accord*, *Irving v. United States*, 909 F.2d 598 (1st Cir. 1990), *Emelwon v. United States*, 391 F.2d 9, 11 (5th Cir. 1967), *cert. denied*, *Florida v. Emelwon*, 393 U.S. 841 (1968), *Ayala v. Joy Mftg. Co.*, 877 F.2d 846 (10th Cir. 1989).

All of these cases demonstrate that the United States can be liable for the negligent failure to inspect or correct deficiencies at governmental work sites. Although some of these cases applied the state law of the given state where the acts occurred, these cases also demonstrate that other state theories include liability *outside* and apart from the peculiar risk doctrine/non-delegable duty theory, where the actor is independently and directly negligent. Nothing in Nevada law prevents seeking liability for negligent conduct, outside of the non-delegable duty theory. To the contrary, Nevada Revised Statute § 41.130, as well as other previously cited Nevada case law, makes it clear that other theories of liability are available to an injured plaintiff.

CONCLUSION

A grave injustice occurred in this decision that not only affects Lloyd Littlefield, but all workers engaged in work on government projects.

Of the utmost significance is that contractual duties, and federally imposed regulatory duties can be "overridden" by state common law theories (which when closely examined *do not* conflict with these other duties). If this decision is allowed to stand, it can subvert Art. VI, Clause 2 and IV, § 3, Clause 2 of the U.S. Constitution, 40 U.S.C. § 333(b), 29 C.F.R. § 1926.3, 1926.650 and 1926.651(k), and will remain inexplicably inapposite to *Camozzi*.

The United States required that this job have U.S. safety inspectors on-site to enforce federally mandated safety regulations. The District Court specifically found the government inspectors failed to do their job, causing the accident. Such findings by the trier of fact have given rise to liability for injuries to workers in all previous circuit decisions. This decision is the *only* decision to ignore the government's liability and hold the U.S. harmless.

This decision has far-reaching public policy considerations, and merits the Court's serious review.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 89-16087, 89-16230

LLOYD LITTLEFIELD,
Plaintiff-Appellee,
v.

UNITED STATES OF AMERICA,
Defendant-third-party plaintiff-Appellant,
v.

FRONTIER-KEMPER CONSTRUCTORS, INC.,
Third-party-defendant-Appellee.

Appeal from the United States District Court
for the District of Nevada

Argued and Submitted Dec. 14, 1990

Decided March 12, 1991

William G. Cole, U.S. Dept. of Justice, Washington, D.C., Paul Wommer, Asst. U.S. Atty., Las Vegas, Nev., for defendant-third-party-plaintiff-appellant.

R. Jay Engel, Law Offices of R. Jay Engel, San Francisco, Cal., for plaintiff-appellee Littlefield.

Robert D. Vannah, Vannah & Roark, Las Vegas, Nev., for third-party-defendant-appellee Frontier-Kemper.

Before ALDISERT*, KOZINSKI and NELSON, Circuit Judges.

THOMAS G. NELSON, Circuit Judge:

We must determine if the district court properly applied Nevada law in this Federal Tort Claims Act case when it held the United States liable for injuries suffered by a contractor's employee in an accident at the Hoover Dam in Nevada.

The United States appeals from an amended judgment awarding $1,035,150.78 to Lloyd Litlefield, an employee of Frontier-Kemper Constructors, Inc. Littlefield sued the United States under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and §§ 2671 *et seq.*, for negligence in the ownership, operation, maintenance, control, supervision, inspection and management of Frontier-Kemper's construction work. The United States impleaded Frontier-Kemper. After a bench trial, the district court held the United States liable for Littlefield's injuries and held the United States was entitled to indemnification from Frontier-Kemper for one-half the total award of damages to the plaintiff.

Trial court jurisdiction was proper based on 28 U.S.C. § 1346(b). Jurisdiction on appeal is proper under 28 U.S.C. § 1291. Because we hold the district court based its decision on an erroneous reading in Nevada law, we reverse the amended judgment. We do not reach the indemnity issue since we decide the government is not liable for Littlefield's injuries.

I

In 1985 the Bureau of Reclamation of the Department of the Interior (the "United States") awarded Frontier-Kemper a contract for spillway modification and repair

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* Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

work on the Hoover Dam. The contract required Frontier-Kemper, as general contractor, to excavate concrete and rock for aeration slots, to construct reinforced aeration slots and to perform concrete repairs in damaged areas of the spillway tunnels. Frontier-Kemper was also required to remove the concrete and rock ("muck") excavated by the blasting and chipping.

The contract required Frontier-Kemper to observe construction safety and health standards promulgated by the Secretary of Labor and published by the Bureau of Reclamation. Additional provisions of the contract bearing on safety responsibilities were as follows:

> d. . . . When violations of the safety and health requirements contained in these specifications or standards referenced in subparagraph a. are called to [the Contractor's] attention . . . the Contractor shall immediately correct the condition to which ation has been directed. . . .
>
> e. In the event the Contractor fails or refuses to promptly comply with the compliance directive issued under subparagraph d. above, the Contracting Officer or his authorized representative may issue an order to stop all or any part of the work. When satisfactory corrective action is taken, an order to resume work will be issued. . . . Failure of the Contracting Officer or his representative to order discontinuance of any or all of the Contractor's operations shall not relieve the Contractor of his responsibility for the safety of personnel and property.

The contract called for the United States and Frontier-Kemper to comply with 29 C.F.R. § 1926.650, which provides in pertinent part:

> Daily inspections of excavation shall be made by a competent person. If evidence of possible cave-ins or slides is apparent, all work in the excavation shall

> cease until the necessary precautions have been taken to safeguard the employees.

The contract also included the rights and obligations of 29 C.F.R. § 1926.3, which gives the Secretary of Labor or any authorized representative the right to entry to any site of contract performance to inspect contract performance.

The nature of the work involved at the construction site, as found by the district court, was as follows: Concrete and rock were blasted and chipped away from the Nevada aeration slot and fell into the spillway tunnel which slanted downward at a 50-degree incline, coming to rest near the elbow of the spillway tunnel, where the tunnel began to run horizontally to an outlet portal. The construction crew called this material the "muck pile." The muck pile accumulated from February 12 to March 6, 1986, when the blasting and excavation of the aeration slots was finished. Frontier-Kemper then began the "mucking operation" to remove the muck pile from the elbow of the Nevada spillway.

The removal procedure selected and used by Frontier-Kemper was to pull down the front of the muck pile with a backhoe and then use a front-end loader to scoop up the debris and load it into two "muck trucks" that would transfer the material to another location for disposal. After the muck pile had receded to the point the backhoe could no longer be used for excavation, Frontier-Kemper began using a "slusher" machine on April 1, 1986, to remove the remaining 2,000 cubic yards of muck. The "slusher" consisted of a steel bucket pulled by steel cables up the incline and then reversed to drag down the slope, pulling the muck with it. During the excavation and mucking operation, approximately 300 to 450 gallons of water per minute ran down the spillway and through the muck pile.

On April 18, 1986, Frontier-Kemper employee Lloyd Littlefield replaced an ill muck truck driver. While Littlefield and another driver were standing next to their trucks, approximately 20 to 40 feet from the slusher machine, the entire muck pile dislodged and slid down the spillway tunnel, pinning Littlefield under the slusher machine. Littlefield suffered serious injuries, including a crushed leg requiring partial amputation.

The United States and Frontier-Kemper had discussed the potential danger of a slide at a Joint Safety Policy Meeting on March 4, 1986. The danger was thereafter considered by a government safety manager and two safety engineers and was brought to the attention of Frontier-Kemper employees prior to April 18, 1986. Following the March 4 meeting, no precautions were taken by the contractor to prevent the slide, nor did the United States issue a stop-work order.

The district court found the United States and Frontier-Kemper knew of the danger of a possible slide of the muck pile which was being removed by the slusher operation and negligently failed to safeguard Littlefield from injury. The district court further found the removal of the muck pile lodged in a 50-degree angle portion of the spillway constituted a peculiar or special risk as the terms are defined in Sections 413 and 416 of the RESTATEMENT (SECOND) OF TORTS. The court thus concluded:

> 4. The contract between Defendant United States and Third-Party Plaintiff Frontier-Kemper contained a general provision requiring Frontier-Kemper to take reasonable precautions to protect the health and safety of employees and Defendant United States also reserved the right to inspect and stop any and all work, thereby retaining some responsibility over matters of employee safety. Therefore, the failure of the government employees to fulfill this retained responsibility for securing compliance with safety rules

constitutes negligence. *Camozzi v. Roland/Miller and the United States of America*, 866 F.2d 287 (9th Cir.1989); *McGarry v. United States*, 549 F.2d 587 (9th Cir.1976).

5. While, generally speaking, the mere reservation of a right to inspect work performed by an independent contractor, does not impose upon the United States government any duty of inspection or control, this rule does not apply to a factual background, such as this where the work is dangerous. *Thorne v. United States*, 479 F.2d 804, 809 (9th Cir.1973); *McGarry v. United States*, 549 F.2d 587 (9th Cir. 1976); *Rooney v. United States*, 634 F.2d 1238, 1244 (9th Cir.1980); *Camozzi v. Roland/Miller and the United States of America*, 866 F.2d 287 (9th Cir. 1989).

6. When work to be performed entails a special risk, the duty to provide the necessary precautions cannot be delegated to an independent contractor. The failure to have said precautions in place constitutes negligent conduct by Defendant. Restatement of Torts 2d, §§ 413, 416; *McGarry v. United States*, 549 F.2d 587 (9th Cir.1976); *Camozzi v. Roland/ Miller and the United States of America, supra; Rooney v. United States, supra; Thorne v. United States, supra.*

District Court Decision at 12-13.

II

Under the Federal Tort Claims Act, the United States is liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. To determine whether a private person would be liable, the court must apply "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Littlefield's accident occurred in

Nevada; thus, the question is whether the district court properly applied Nevada tort law in placing liability on the government. The issue presented concerns a question of law, which we review *de novo*. *U.S. v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

The district court expressly tied the government's liability to the existence of a nondelegable duty, as enunciated in the Restatement of Torts. The district court's prediction of how the Nevada Supreme Court would rule on the issue of nondelegable duty owed to a contractor's employee was based on federal cases. However, the court did not consider the case of *Sierra Pacific Power Co. v. Rinehart*, 665 P.2d 270 (Nev.1983) (per curiam), in which the Nevada Supreme Court held that a landowner does not have a nondelegable duty to ensure the safety of a contractor's employees. Because a federal court applying state law is bound by the decisions of that state's highest court, *Olympic Sports Products, Inc. v. Universal Athletic Sales Co.*, 760 F.2d 910 (9th Cir. 1985), *cert. denied*, 474 U.S. 1060, 106 S.Ct. 804, 88 L.Ed.2d 780 (1986), the district court's application of Nevada law in this case was incorrect.

The nondelegable duty theory relied on by the district court in its opinion is set forth in the RESTATEMENT (SECOND) OF TORTS, §§ 413 and 416:

> § 413. Duty to Provide for Taking of Precautions Against Dangers Involved in Work Entrusted to contractor.
>
> One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer

(a) fails to provide in the contract that the contractor shall take such precautions, or

(b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

§ 416. Work Dangerous in Absence of Special Precautions.

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of harm *to others* unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise. [Emphasis added.]

Thus, Section 413 states the duty of the employer to require its contractor to take necessary precautions against risks inherent in the work to be done by the contractor. Section 416 states that the employer has a nondelegable duty to others to see that the contractor takes such precautions, even if the employer has imposed that duty on the contractor.

Courts have developed two interpretations of the term "others." Some courts have held that the term does not include the contractor's employees; while others, including the district court here, have held the term does include contractor's employees. *See Nelson v. U.S.*, 639 F.2d 469, 474-75 (9th Cir.1980) (collecting cases); and *Sierra Pacific v. Rinehart*, 665 P.2d at 273-74. After considering both interpretations, the Nevada Supreme Court concluded in *Rinehart* that "the better reasoned position is that taken by those courts which have held that the employees of an independent contractor are not included in the definition of the word 'others,'" particularly "when the contractor is solvent and as well informed and as

competent as the employer in the methods necessary to avoid accidental injuries to workers." 665 P.2d at 273-74.

In rejecting Sections 413 and 416 as a basis for landowner/employer liability, the Nevada Supreme Court found the reasoning of *Nelson v. U.S.*, 639 F.2d 469, to be compelling. 665 P.2d at 274. In *Nelson*, the plaintiff's decedent drowned while working for a contractor of the United States Coast Guard on a wave suppressor machine in hazardous wave conditions. *Nelson*, 639 F.2d at 471, 476. This court reversed the judgment in favor of the plaintiff, stating:

> In this case, as the trial court itself observed, "the Government was not privy to any particular knowledge which was not available to the contractor." There is no suggestion here that the Government was in a better position than the contractor either to anticipate dangers to workmen, to foresee and evaluate the best methods of protection, or to implement and enforce compliance with appropriate on-site safety precautions. As long as an independent contractor is informed about particular safety risks, and is competent and solvent, there is no reason in law or policy why he alone should not be fully responsible for injuries to workmen arising out of the performance of inherently dangerous jobs in which the contractor has special skill and experience not shared by the owner.

Id. at 478 (citation omitted).

Littlefield argues that notwithstanding the district court's reliance on Sections 413 and 416 of the Restatement, the judgment must be upheld because the court held the United States independently liable for failing to require the independent contractor to enforce safety provisions as provided by the contract. This argument fails to recognize the fundamental distinction between liability imposed under tort law and the limited rights and obligations of signatory parties under contract law.

Tort liability is imposed by conduct of persons under circumstances in which a duty arises to another person, and a breach of that duty is the proximate cause of injuries and damages to that person. Liability under contract law is limited to the rights and obligations of the contracting parties expressed in the agreement. This distinction, although basic hornbook law, bears emphasis here because Littlefield's theory of the government's independent tort liability is predicated on the safety provisions of the agreement between the government and the contractor.

The written agreement between the United States and Frontier-Kemper merely establishes the rights and obligations of the parties. As we have observed, the contract gives Frontier-Kemper ultimate responsibility for safety during the operations, but it also requires both the United States and Frontier-Kemper to make daily inspections of the excavation site and to stop all work upon evidence of a possible cave-in or slide in accordance with 29 C.F.R. § 1926.650. This clearly gives the United States a contractual right to inspect and to stop the work if necessary. But the contract goes no further. It does not provide that the government becomes an indemnitor if the work is not stopped and an employee of the contractor is injured; stripped to its basics, that is precisely what Littlefield's argument would have us read into the contract.

Littlefield's contention that the government is independently liable seems to ignore that this action was brought under the Federal Tort Claims Act, and that under that statute the federal government is liable only to the same extent that an individual may be held liable under the tort law of the state where the act or omission occurred. 28 U.S.C. §§ 2674 and 1346(b). Here that state is Nevada. Thus, the relevant issue is whether Nevada law recognizes a duty under tort law owed by the landowner to an independent contractor's employee,

the breach of which constitutes negligence. The highest court of that state has addressed this precise issue. Under the teachings of *Rinehart*, Nevada has opted to interpret the "risk of physical harm to others" as set forth in Sections 413 and 416 of the Restatement not to include risk of physical harm to employees of an independent contractor. 655 P.2d at 273-74.

Inasmuch as Littlefield's right to recover in this action is limited to relief under Nevada tort law, the respective rights and obligations of the parties to the construction agreement established under contract law, for our purposes here, are legally irrelevant. Clearly, the government had the right to stop construction in the presence of some safety violation. But that simply was a right conferred upon it by the contract, a right that could be enforced under the law of contracts. Under the circumstances at bar, this right does not become an obligation or duty under Nevada tort law, the breach of which would impose liability. We may not mix the tort apples with contract oranges.

In addition to expressly rejecting the nondelegable tort duty theory, *Rinehart* also held that the landowner, Sierra Pacific Power Company, had no common law duty to take safety precautions during the construction of a generating station cooling tower, because the dangerous condition "was created during the course, and as a necessary consequence of, building the cooling tower." *Rinehart*, 665 P.2d at 272-73.

In this case, as in *Rinehart*, the dangerous condition complained of was created during the course, and as a necessary consequence, of the construction work Frontier-Kemper was performing on the aeration slots. The government in this case was in no better position than the contractor to anticipate dangers and implement precautions. There is no question of the competency or solvency of the independent contractor. Therefore, under Nevada law, the government had no nondelegable duty under Sec-

tion 416 of the Restatement to employees of Frontier-Kemper, such as Littlefield, and it was error for the district court to impose liability on the United States in this case.

III

This result is not affected by two cases cited by Littlefield. The Nevada Supreme Court held in *Karadanis v. Newcomb*, 698 P.2d 872 (1985), that a landowner may be liable for injuries to an independent contractor's employee if: (1) the hazardous condition was not "open and obvious;" (2) the condition was not a necessary consequence of the construction; and (3) the landowner maintained possession and control of the premises. *Id.* at 874-75. In *Karadanis* the contractor's construction elevator used in erecting a building had been modified by removing parts of a safety wall, thereby creating the dangerous condition that resulted in injury to a contractor's employee. The Nevada court specifically found that the dangerous condition was not a necessary consequence of the construction. *Id.*

Rinehart applies in this case. The muck pile was a necessary consequence of the tunnel excavation performed by Frontier-Kemper, unlike the elevator discussed in *Karadanis*.

Likewise, the case of *McGarry v. U.S.*, 549 F.2d 587 (9th Cir.1976), *cert. denied*, 434 U.S. 922, 98 S.Ct. 398, 54 L.Ed.2d 279 (1977), does not affect the outcome of this appeal, as it pre-dates the Nevada Supreme Court's *Rinehart* opinion and is otherwise distinguishable. In *McGarry*, the government-landowner was held liable for the electrocution death of a contractor's employee at the Atomic Energy Commission (AEC) Nevada Test Site. 549 F.2d at 591. In the absence of Nevada law concerning the duty of care owed by the employer of a contractor to the contractor's employees, the *McGarry* Court looked to *Thorne v. U.S.*, 479 F.2d 804 (9th Cir.1973), which held when an independent contractor is employed

to engage in "extra dangerous" work, the employer of the contractor has a duty to see that the contractor takes proper precautions to protect those who might sustain injury from the work. *McGarry*, 549 F.2d at 590.

The *McGarry* court found no error in imposing this duty of care under the circumstances of the case.

> The power line was owned by the United States. It was to be contemplated that contractors would engage in work [drilling of exploration holes to ascertain geology] in its neighborhood, and the AEC here was aware of the location of the exploratory hole. In our judgment where a contractor is employed to perform work of a sort that may bring the worker into contact with a power line, the work is extra dangerous and the *Thorne* holding is applicable.

Id. *McGarry* is thus distinguishable because the hazard which resulted in the death of the worker was not a necessary consequence of the contractor's work.

Littlefield argues that the district court also found a "retained obligation" on the part of the United States as an alternative ground of liability. However, in context, it is apparent that the district court thought the "retained authority" of the United States was part and parcel of the nondelegable duty discussion. The court stated in its findings:

> Pursuant to the contract entered between Defendant United States of America and Third-Party Defendant Frontier-Kemper, the Bureau of Reclamation reserved the right to inspect the activities of Frontier-Kemper and were authorized under the contract to stop work on removal of the muckpile, but negligently failed to do so. The Court finds that under the circumstances of this case, removal of the muckpile lodged in the 50 [degree] angle portion of the spillway on April 18, 1986, constituted a peculiar

> or special risk as that term is defined in § 413 and § 416 of the Restatement of Torts 2d. Therefore, Defendant United States of America owed a nondelegable duty to take necessary precautions to address such special risk, and in this case breached its duty to do so.

District Court Decision at 10.

However, the "retained authority" argument avails Littlefield nothing, even if the district court had relied on it as an independent ground of liability. The decision in this case turns on the question of duty. Under *Rinehart*, the United States had no nondelegable duty to employees of the contractor, and it is clear that the government assumed no such duty by reason of its contract with Littlefield's employer. See portion of contract quoted on page 1100-1101, *supra*.

Because our decision concerning the issue of liability is dispositive of the appeal, we find it unnecessary to consider other issues raised by the parties. Accordingly, the decision of the district court is reversed, the judgment against the government vacated, and the case remanded with instructions to dismiss plaintiff-appellee's complaint and the United States' third-party complaint.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 89-16087
89-16230

D.C. No. CV-S-87-0716-PMP

LLOYD LITTLEFIELD,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-third-party plaintiff-Appellant,

v.

FRONTIER-KEMPER CONSTRUCTORS, INC.,
Third-party-defendant-Appellee.

ORDER

[Filed May 9, 1991]

Before: ALDISERT *, KOZINSKI and T. G. NELSON, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-S-87-716-PMP

LLOYD LITTLEFIELD,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant,

UNITED STATES OF AMERICA,
Third-Party Plaintiff,

v.

FRONTIER-KEMPER CONSTRUCTORS, INC.,
Third-Party Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed Jun. 21, 1989]

This action was commenced on September 28, 1987, by the filing of Plaintiff's Complaint pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and § 2671, et seq. By his Complaint, Plaintiff seeks an award of damages from Defendant for injuries received in an accident which occurred on April 18, 1986, at the Hoover Dam Nevada Spillway Tunnel.

On August 31, 1988, Defendant United States of America filed a Third-Party Complaint (#19) against Third-Party Defendant Frontier-Kemper Constructors,

Inc. ("Frontier-Kemper") seeking indemnification for all sums that may be adjudged against Defendant United States of America in favor of Plaintiff Lloyd Littlefield.

On May 30, 1989, this case proceeded to trial without a jury. Due to a variety of scheduling problems and calendaring conflicts, the trial was not completed until June 13, 1989. On the basis of the evidence adduced at said trial, the Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

On July 31, 1985, Third-Party Defendant Frontier-Kemper, a construction company incorporated under the laws of the State of Indiana, was awarded a contract offered by the Defendant United States Department of Interior through the Bureau of Reclamation for spillway modification and repair work to be done at Hoover Dam which is located on the Colorado River at the border of Nevada and Arizona, near Boulder City, Nevada. In part, the contract required Frontier-Kemper, as general contractor, to excavate concrete and rock for aeration slots, to construct reinforced concrete aeration slots, and to perform concrete repairs in damaged areas of the spillway tunnels on the Nevada and Arizona sides of the dam. Frontier-Kemper was also responsible under the contract for removal of the concrete and rock ("muck"), excavated by means of blasting and chipping, to a location in the vicinity of Hoover Dam location in the vicinity of Hoover Dam provided by the United States. The contract further provided as follows:

> "a. The Contractor shall not require any laborer or mechanic employed in the performance of the contract to work under conditions which are unsanitary, hazardous, or dangerous to his health or safety, as determined under construction safety and health standards promulgated by the Secretary of Labor under section 107 of the Contract Work Hours and Safety

Standards Act (40 U.S.C. 317 et seq.), as amended, and 'Construction Safety Standards,' published by the Bureau (Bureau of Reclamation).

b. The Contractor shall fully comply with the Bureau's 'Construction Safety Standards' and amendments or revisions thereto in effect on the date bids are received. This handbook will be provided at no charge for use in connection with the specifications. Construction Safety and Health Standards promulgated by the Secretary of Labor may be obtained from any regional office of the occupational Safety and Health Administration of the U.S. Department of Labor.

c. The Contractor shall submit in writing a proposed safety program in the form and time intervals prescribed in section 2 of the 'Construction Safety Standards.'

d. The Contractor is responsible for being cognizant of and insuring compliance with the requirements set forth in subparagraphs a. and b. above. Such responsibility shall apply to both his operations and those of his subcontractors. When violations of the safety and health requirements contained in these specifications or standards referenced in subparagraph a. are called to his attention by the Contracting Officer or his authorized representatives, the Contractor shall immediately correct the condition to which attention has been directed. Such notice, either oral or written, when served on the Contractor or his representatives shall be deemed sufficient.

e. In the event the Contractor fails or refuses to promptly comply with the compliance directive issued under subparagraph d. above, the Contracting Officer or his authorized representative may issue an order to stop all or any part of the work. When satisfactory corrective action is taken, an order to resume

work will be issued. The Contractor shall not be entitled to any extension of time, nor to any claim for damage or to additional compensation by reason of either the directive or the stop order. Failure of the Contracting Officer or his representative to order discontinuance of any or all of the Contractor's operations shall not relieve the Contractor of his responsibility for the safety of personnel and property."

Under the contract, Defendant United States of America and Third-Party Defendant Frontier-Kemper were required to meet the requirements of 29 CFR § 1926.650 which provides in pertinent part that:

> Daily inspections of excavation shall be made by a competent person. If evidence of possible cave-ins or slides is apparent, all work in the excavation shall cease until the necessary precautions have been taken to safeguard the employees.

Additionally, the contract between Defendant United States and Frontier-Kemper included the rights and obligations set forth in 29 CFR § 1926.3 which provides:

> *Inspections-right of entry.*
>
> (a) It shall be a condition of each contract which is subject to section 107 of the Contract Work Hours and Safety Standards Act that the Secretary of Labor or any authorized representative shall have a right of entry to any site of contract performance for the following purposes:
>
> (1) To inspect or investigate the matter of compliance with the safety and health standards contained in Subpart C of this part and following subparts; and
>
> (2) To carry out the duties of the Secretary under section 107(b) of the Act.
>
> (b) For the purpose of carrying out his investigative duties under the Act, the Secretary of Labor may, by

agreement, use with or without reimbursement the services, personnel, and facilities of any State or Federal agency. Any agreements with States under this section shall be similar to those provided for under the Walsh-Healey Public Contracts Act under 41 CFR Part 50-205.

The excavation of the aeration slot in the Hoover Dam Nevada spillway tunnel commenced on February 12, 1986, primarily by blasting and shipping rock, concrete and similar material. The construction of the aeration slot was in an area of the spillway tunnel which was on a 50-degree incline (50 degrees up from horizontal) approximately 420 feet upstream from the location in the tunnel where the accident in which Plaintiff received his injuries occurred. The concrete and rock which were blasted and chipped away from the aeration slot fell down the 50-degree incline, coming to rest at or near the elbow of the spillway tunnel where the tunnel began to run horizontally for approximately ¾ of a mile to the outlet portal located on the Colorado River below Hoover Dam.[1] This accumulated material was referred to by the construction crew as the "muck pile". The muck pile accumulated from February 12 to March 6, 1986, when the blasting and excavation of the aeration slot was complete. Thereafter, Frontier-Kemper began the "mucking operation" to remove the muck pile from the elbow of the Nevada spillway tunnel.

The procedure selected by Frontier-Kemper for muck removal was to pull down the front of the muck pile with a backhoe, then use a front-end loader to scoop up the

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[1] Although it is not practical to photocopy Plaintiff's oversized exhibit #7, reference to the exhibit which consists of a drawing of the Nevada spillway tunnel at Hoover Dam and the approximate location of the "muck pile" located therein, is helpful to an understanding of these facts. Additionally, the Court has appended to these Findings of Fact and Conclusions of Law a copy of an exhibit utilized in several depositions taken in this case which roughly depicts the configuration of the spillway tunnel in question.

debris and load it into the back of two "muck trucks" which would then ferry the material approximately ¾ of a mile through the horizontal portion of the Nevada spillway tunnel to the outlet portal where the muck would be lifted by a crane onto a barge ferried down the Colorado River to another location for disposal.

The mucking operation by means of the backhoe and front-end loader continued from March 22 until approximately March 31, 1986, when the muckpile had been remover up to the point at which it proceeded from the elbow up the 50-degree incline to such an extent that the backhoe could no longer be employed to excavate the muck.

On April 1, 1986, Frontier-Kemper installed and began operation of a "slusher" machine which consisted of a ¼-cubic yard steel bucket which would be pulled by means of steel cables to a point up the incline of the muckpile and then reversed to drag the bucket downslope pulling muck with it. The muck pulled to the bottom of the muckpile would then be scooped up by means of the front-end loader, loaded into the back of a muck truck and driven out of the Nevada spillway tunnel for removal to the barge. Approximately 1,000 cubic yards of muck had been removed by the backhoe and front-end loader method prior to April 1, 1986, and there remained approximately 2,000 cubic yards to be removed by means of the slusher/front-end loader method thereafter. Throughout the excavating and mucking procedure, a substantial amount of water, estimated by Defendant's post-accident investigation team to be about 300-450 gallons per minute, ran down the spillway and through the muck pile.

On or about April 11, 1986, Plaintiff Lloyd Littlefield, age 39 and a resident of Parker, Arizona, became employed by Frontier-Kemper at the Hoover Dam Spillway Modification and Repair Boulder Canyon Project as a general miner/laborer.

On April 18, 1986, he was selected to replace an ill muck truck driver. At approximately 10:05 a.m., Plaintiff and the other muck truck driver had parked their muck trucks as directed by the slusher operator approximately 20-40 feet from the slusher machinery and were standing next to the trucks when the entire muckpile dislodged and slid down the spillway tunnel traveling approximately 150 feet. Plaintiff was pinned under the slusher machine and suffered injuries including a crushing injury to his left leg which resulted in its amputation at the knee, fractures of the right leg and foot, a puncture wound through his right foot, a punctured lung, eight fractured ribs, fractures of both clavicle bones, and various other cuts and bruises.

Following his injury, Plaintiff received benefits under the Nevada State Industrial Insurance System (SIIS) in the amount of $111,521.49, pursuant to NRS 616.010, et seq., which amount is reflected in the notice of SIIS lien filed June 1, 1989 (#49).

There is no dispute that at the time of the accident Plaintiff was acting within the scope and course of his employment for Frontier-Kemper.

The Court finds that a preponderance of the evidence adduced at trial establishes that prior to April 18, 1986, Defendant United States and Third-Party Defendant Frontier-Kemper knew of the danger of a possible slide of the muckpile which was being removed by means of the slusher operation, and negligently failed to take necessary precautions to safeguard Plaintiff from injury.

The method of removal of the muck pile caused the base or "toe" of the pile to be reduced to the point that the remainder of the muckpile and the 50° angle portion of the spillway tunnel presented an inherent danger of sliding. The instability of the muckpile was exacerbated by the continuous flow of water down the spillway tunnel and through the muckpile which impacted not only on the

fines and other materials comprising the muckpile, but more importantly acted as a lubricant between the bottom of the muckpile and the concrete lining of the spillway tunnel, thereby reducing the friction which helped to hold the muckpile in place. Further, the invert protection material which had been employed during the blasting phase of the aeration slot excavation to protect the invert lining of the spillway tunnel and which thereafter became a part of the muckpile itself, affected the intended operation of the slusher machine by inhibiting the expected sloughing of the muckpile, thereby contributing to the slide.

The potential danger of a slide was recognized by Defendant United States of America and Third-Party Defendant Frontier-Kemper as early as March 4, 1989, when it was discussed at a Joint Safety Policy Meeting. The danger was thereafter considered by the Bureau of Reclamation Safety Manager Jesse Wert, and Safety Inspectors Harold Whitney and Mark Pata, and was brought to the attention of Frontier-Kemper employees prior to April 18, 1986. Nonetheless, Frontier-Kemper failed to take necessary precautions to prevent the slide of the muckpile and to prevent the potential for injury to muck truck drivers such as Plaintiff by keeping muck truck drivers safely away from the area of the muckpile during the operation of the slusher machine. Similar, Defendant United States of America failed to take steps to ensure against the slide and injury to Plaintiff by ordering Frontier-Kemper to cease the muckpile removal system employed and to ensure the safety of muck truck drivers such as Plaintiff under what can only be described as inherently dangerous circumstances.

Pursuant to the contract entered between Defendant United States of America and Third-Party Defendant Frontier-Kemper, the Bureau of Reclamation reserved the right to inspect the activities of Frontier-Kemper and were authorized under the contract to stop work on re-

moval of the muckpile, but negligently failed to do so. The court finds that under the circumstances of this case, removal of the muckpile lodged in the 50° angle portion of the spillway on April 18, 1986, constituted a peculiar or special risk as that term is defined in § 413 and § 416 of the Restatement of Torts 2d. Therefore, Defendant United States of America owed a non-delegable duty to take necessary precautions to address such special risk, and in this case breached its duty to do so.

The Court further finds that Plaintiff Lloyd Littlefield did not contribute in any way to his own injuries sustained on April 18 1986. Rather, as a direct and proximate result of the comparatively equal negligence of Defendant United States and Third-Party Defendant Frontier-Kemper, Plaintiff Lloyd Littlefield suffered and sustained the injuries described above, and has suffered the following damages:

a. Medical expenses up to the time of these Findings of Fact in the amount of $47,150.78;

b. Loss of earnings from the date of the accident to the date of these Findings of Fact in the amount of $98,000.00;

c. Future loss of earning capacity from the date of these Findings of Fact in the amount of $690,000.00;

d. General damages for pain and suffering in the amount of $200,000.00.

Because the injuries received and damages sustained by Plaintiff Littlefield were the direct and proximate result of the common negligence of Defendant United States and Third-Party Defendant Frontier-Kemper, and because Defendant United States has alleged a proper claim for indemnity in its Third-Party Complaint against Frontier-Kemper, Defendant United States is entitled to indemnification from Third-Party Defendant Frontier-Kemper in the amount of one-half of the damages awarded Plaintiff from Defendant United States.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court draws the following conclusions of law:

1. This Court has jurisdiction over this action and the parties pursuant to 28 U.S.C. §§ 1346(b) and 1271, et seq.

2. The United States of America is liable in the same manner and to the same extent as a private individual under like circumstances in accordance with the law of the State of Nevada where the accident of April 18, 1986 occurred. 28 U.S.C. §§ 2674, 1346(b).

. . .

3. A negligent defendant is responsible for all foreseeable consequences proximately caused by its negligence. NRS § 41.130; *Taylor v. Silva*, 96 Nev. 738, 615 P.2d 970 (1980); *Nevada Transfer v. Warehouse Co.*, 60 Nev. 87, 99 P.2d 633 (1940).

4. The contract between Defendant United States and Third-Party Plaintiff Frontier-Kemper contained a general provision requiring Frontier-Kemper to take reasonable precautions to protect the health and safety of employees and Defendant United States also reserved the right to inspect and stop any and all work, thereby retaining some responsibility over matters of employee safety. Therefore, the failure of the government employees to fulfill this retained responsibility for securing compliance with safety rules constitutes negligence. *Camozzi v. Roland/Miller and the United States of America*, 866 F.2d 287 (9th Cir. 1989); *McGarry v. United States*, 549 F.2d 587 (9th Cir. 1976).

5. While, generally speaking, the mere reservation of a right to inspect work performed by an independent contractor, does not impose upon the United States government any duty of inspection or control, this rule does not apply to a factual background, such as this where the

work is dangerous. *Thorne v. United States*, 478 F.2d 804, 809 (9th Cir. 1973); *McGarry v. United States*, 549 F.2d 587 (9th Cir. 1976); *Rooney v. United States*, 634 F.2d 1238, 1244 (9th Cir. 1980); *Camozzi v. Roland/ Miller and the United States of America*, 866 F.2d 287 (9th Cir. 1989).

6. When work to be performed entails a special risk, the duty to provide the necessary precautions cannot be delegated to an independent contractor. The failure to have said precautions in place constitutes negligent conduct by Defendant. Restatement of Torts 2d, §§ 413, 416; *McGarry v. United States*, 549 F.2d 587 (9th Cir. 1976); *Camozzi v. Roland/Miller and the United States of America, supra; Rooney v. United States, supra,; Thorne v. United States, supra.*

7. In defining what constitutes a "special risk," it is not essential that the special risk "be one which will necessarily and inevitably arise in the course of the work, no matter how it is done. It is sufficient that it is a risk which the employer should recognize as one likely to arise in the course of the ordinary and usual method of doing the work or the particular method which the employer knows that the contractor will adopt." Restatement of Torts 2d, § 416, com (e).

8. That the notice of SIIS lien filed in this Court on June 1, 1989 (#49), constitutes a lien in the amount of $111,521.49, pursuant to NRS § 616.560, upon the judgmentrendered herein in favor of Plaintiff.

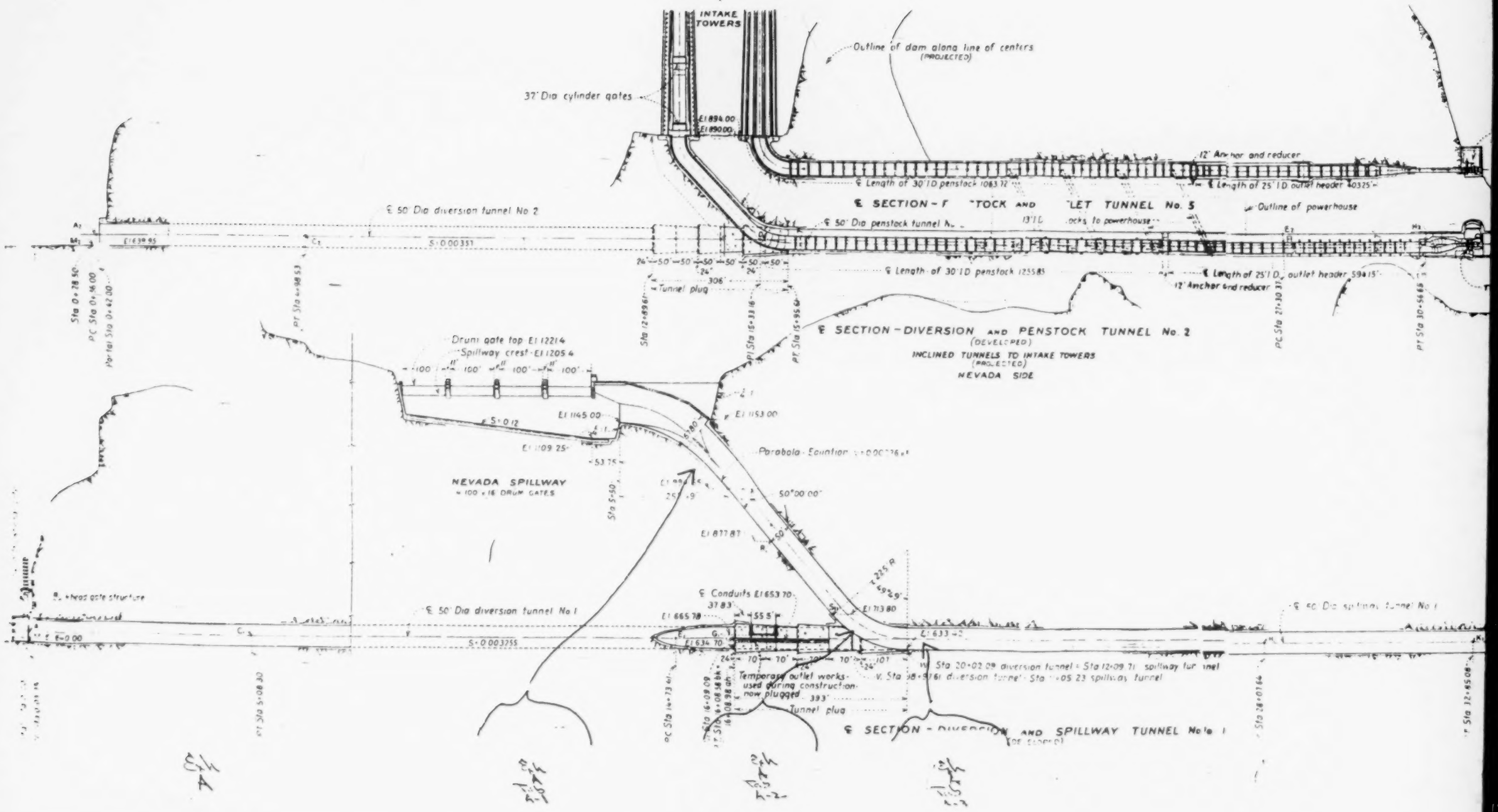
9. The negligence on the part of Defendant United States and Third-Party Defendant Frontier-Kemper is apportioned equally on a comparative basis, and was the direct and proximate cause of the injuries received and damages sustained by Plaintiff Lloyd Littlefield.

10. Plaintiff is entited to judgment against Defendant United States in the total amount of $1,035,150.78.

11. On its Third-Party Complaint against Frontier-Kemper, Defendant United States is entitled to indemnification from Third-Party Defendant Frontier-Kemper in the amount of one-half the total award of damages to Plaintiff in this case in the total amount of $517,575.39.

DATED: June 20, 1989

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge



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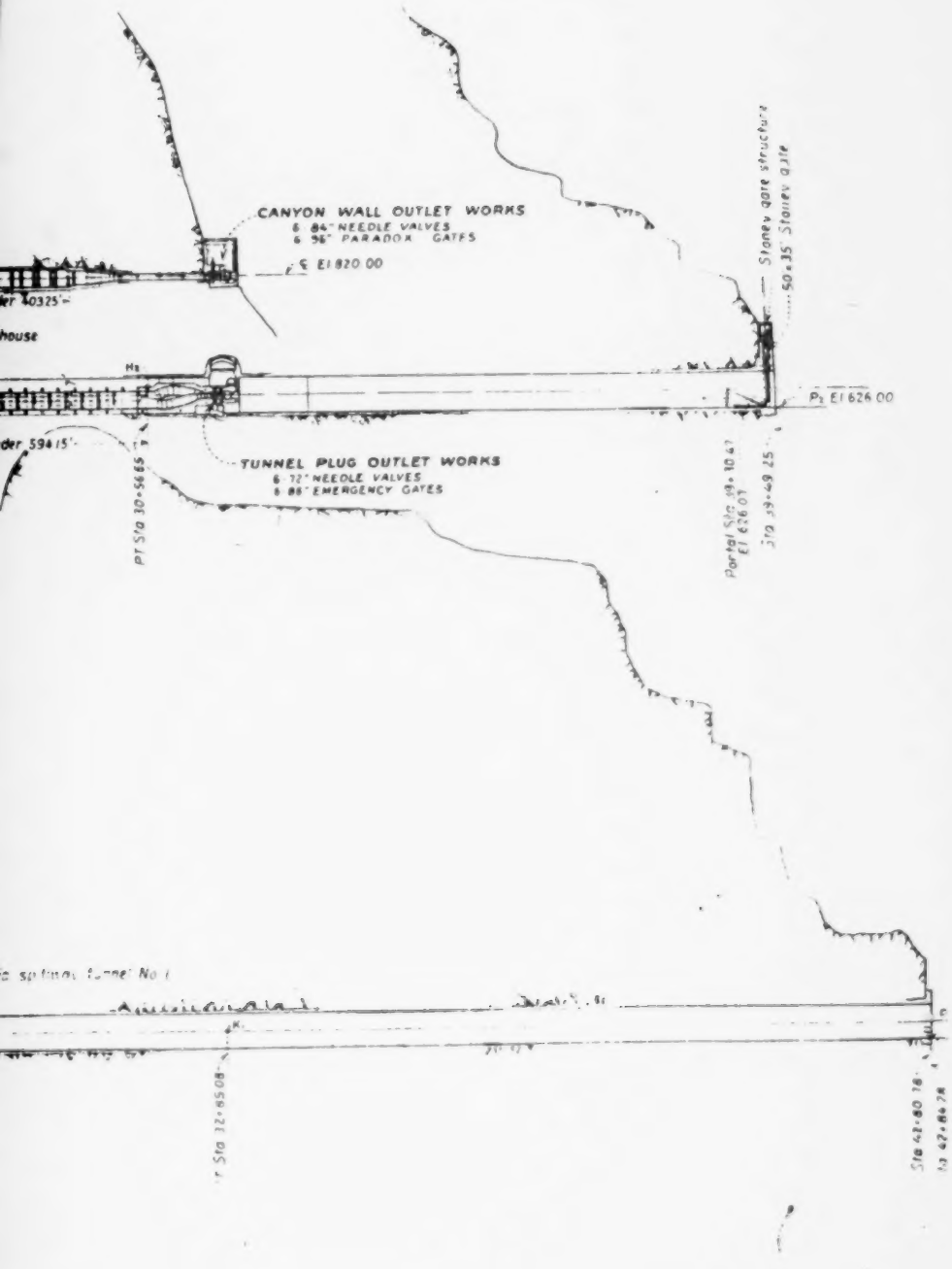

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